THE INTERCHANGEABLE MILEAGE CASE.

I.

THE Supreme Judicial Court of Massachusetts has again divided upon a question of constitutional law. In Attorney-General *v.* Old Colony Railroad,[1] a majority has held that the law providing for the issue by each Massachusetts railroad of mileage tickets, to be received upon every railroad in the State, is unconstitutional.

The Act upon which proceedings in the case were founded (Stat. 1892, ch. 389) is as follows: —

"Sect. 1. Every railroad corporation operating within this Commonwealth shall provide and have on sale for twenty dollars mileage tickets representing one thousand miles, which shall be accepted and received for fare and passage upon all railroad lines in this Commonwealth, as well and under like conditions as upon the line or lines of the corporation issuing such ticket.

"Sect. 2. Such tickets or any part thereof shall be redeemed by each corporation issuing the same, upon presentation by any other railroad corporation.

"Sect. 3. On petition of any railroad corporation included within the provisions of this Act, filed with the railroad commissioners, asking that it may be exempt, or that any other railroad be excluded from the provisions of this Act, said commissioners may in their discretion exempt or exclude such railroad from the provisions of this Act, if in their judgment the public welfare or the financial condition of the road require or demand it."

The defendant corporation having refused to comply with the provisions of the Act, the Attorney-General filed an information to compel it so to do. The court held the Act unconstitutional, and dismissed the information. It is unfortunate that even that majority of the court which declared the statute unconstitutional was unable to agree upon the reason for its decision.

It would therefore seem that since a majority of the whole court agreed upon no principle of law, but only in the result, the case is

[1] 35 N. E. Rep. 252.

of no value as a precedent. But as the statute itself was of much importance, an examination of the question may not be unprofitable.

It is also unfortunate that the different grounds upon which the majority proceeded are not more clearly stated. In questions of constitutional law there is necessarily greatness of scope and some vagueness of outline. The utmost care is therefore required to reach the result by strictly legal reasoning, and above all to make certain what clause, if any, of the Constitution is relied upon as making the Act in question void. It is perhaps the highest quality of a legal mind, as distinguished from the merely philosophical or ethical, that it permits no uncertainty of meaning and no looseness of argument. An Emersonian sentence could not be tolerated in an opinion of Marshall.

Field, C. J. (with whom Allen and Morton, JJ., concurred), held the statute unconstitutional because "the statute authorizes one railroad to determine the conditions on which another railroad must carry passengers, and compels one railroad to carry passengers on the credit of another." What constitutional provisions Chief Justice Field had in mind is not clear. A somewhat careful examination has discovered but two,[1] each forbidding the taking of individual property without compensation. In the course of the opinion it is said: "If it be assumed that under the power to regulate the fares of common carriers of passengers the Legislature can require the passengers to be carried before the fares have been actually paid in money, the security for the ultimate payment of the fares in money ought, we think, to be as certain as that required when private property is taken for public uses." This may mean that in the opinion of Field, C. J., the statute has resulted in the taking of property; if so, the learned judge has not expressed himself with his usual clearness.

That the three judges who concur in this opinion did not mean to base their objection to the statute on the ground that it effected a taking of property, is made probable by the carefully guarded language of the following paragraph. "Mr. Justice Lathrop and Mr. Justice Barker agree that the informations are rightfully brought by the Attorney-General, and that the court has jurisdiction, and are of opinion that the necessary effect of the statute is to apply and appropriate individual property to the public use without the owner's consent, and without legal provision for a reasonable com-

[1] Mass. Const. Pt. I. Art. X.; Const. U. S. Amend. XIV.

pensation therefor; and for this reason they agree that the statute is void, without expressing an opinion upon the other matters discussed in this opinion."

We have, then, this result. Two judges, Knowlton and Holmes, JJ., held the statute not unconstitutional. Lathrop and Barker, JJ., held it repugnant to the constitutional provisions which govern the taking of private property. Three judges held it unconstitutional, on what ground does not clearly appear. But if no taking of property was effected by the statute, there seems to be no constitutional provision to make it void. Let us inquire, then, what property, if any, is taken by the statute.

II.

When a railroad company undertakes the business of a carrier, its property is of two sorts: first, its franchise; second, the real and personal property which it provides for transporting passengers and goods from place to place. To its franchise it has no absolute right. That is resumable by the State which gave it, and may be withdrawn at any time (subject to a condition discussed later) without compensation. Its real and personal property, roadbed, bridges and rails, locomotives and cars, stations and platforms, are protected by the Constitution, and a State can do no act to destroy their actual value without providing compensation for the taking. It seems to be the better opinion that the State cannot so regulate the affairs even of a corporation engaged in a public employment as to destroy the value of the property actually invested. The value of the property of a railroad would be in part destroyed if the earning capacity of the road were so reduced by the Legislature that it would not pay to operate, and must therefore be abandoned; for the value of its immovable property would then become almost nothing. Any regulation of the corporation's affairs which still enables the corporation to conduct its business at a profit is not objectionable on the ground that it is a taking of its land or its chattels, though it may greatly reduce its income. It was strongly asserted by Knowlton, J., that this Act would not appreciably reduce the earnings of any railroad. "The risk of pecuniary loss to a corporation from carrying a passenger on the credit of another corporation to which the money has been advanced for carriage, instead of having payment at the time, is almost infini-

tesimal." And there was, in fact, no allegation in the answer of the defendants that the Act would cripple the resources of the road. The power given by Section 3 to the railroad commissioners to exclude a road from the provisions of the Act would seem to prevent all possibility of such a result.

If the Act effects a taking of any sort, it is a taking of the use of property. If it had provided that every owner of a vehicle in the Commonwealth should be obliged to transport his neighbors on demand, receiving in payment therefor their promissory notes, we should evidently have a taking of the use of vehicles. How, if at all, does our Act differ?

The difference lies in this: that the use of the property of a public carrier is already devoted to the public. Thus, it is obliged to keep safe stations and platforms for all who have business at its trains;[1] to stop at its regular stopping-places;[2] to protect passengers who are about to take the train, even if they have not purchased a ticket;[3] and to allow hackmen, expressmen, etc., to enter their stations for the purpose of soliciting patronage from passengers.[4] The vehicles of the carrier are not, to be sure, absolutely devoted to the use of the public; the public has the right to use them only upon payment of fare. But if such passengers as take advantage of the Act can be said to pay their fares, the Act does not result even in taking the use of property. What, then, is a payment of fare?

Payment of fare is not the payment of a debt, properly so called. For instance, the passenger need not tender the exact amount.[5] The payment is of a double nature: first, the performance of an obligation of a quasi-contractual nature, like the obligation to pay the fee of a public officer;[6] second, the performance of a condition which secures the payer the right to ride. The exact

[1] Tobin *v.* Railroad, 59 Me. 183; Hale *v.* Railway, 60 Vt. 605.

[2] Sears *v.* Eastern R. R., 14 All. 434; Heirn *v.* McCaughan, 32 Miss. 17; Purcell *v.* Railroad, 108 N. C. 414.

[3] Brien *v.* Bennett, 8 C. & P. 724; Smith *v.* Railway, 32 Minn. 1; Perry *v.* Railroad, 66 Ga. 746; Swigert *v.* Railroad, 75 Mo. 475; Hickinbottom *v.* Railroad, 15 N. Y. St. Rep. 11.

[4] Hack Co. *v.* Sootsma, 84 Mich. 194; Railway *v.* Langlois, 9 Mont. 419; Cravens *v.* Rodgers, 101 Mo. 247; McConnell *v.* Pedigo, 18 S. W. 15 (Ky.); S. B. Co. *v.* Transportation Co., 10 So. 480 (Fla.). And see Griswold *v.* Webb, 16 R. I. 649. There is, to be sure, a single case *contra*, Railroad *v.* Tripp, 147 Mass. 35, decided by a bare majority of the court. The powerful dissenting opinion of Judge Field has been quoted with approval in most of the cases cited above.

[5] Barrett *v.* Railway, 81 Cal. 296.

[6] Keener on Quasi-Contracts, 18.

nature of this condition and obligation is determined by law, and may be changed by law; and so long as its nature remains the same, the change is not unconstitutional.

"A mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." [1]

Does this Act, then, effect a complete and oppressive change in the nature of fare? In order to determine this question, let us see what power the Legislature is admitted to possess over fares.

1. It is as well settled as any principle of law can be settled by multitude of precedents that the Legislature may fix the maximum amount of fare.[2] At common law a carrier might exact such amount as the court would not hold to be unreasonable; but by the Granger Acts and similar legislation, the maximum fare is fixed at the pleasure of the Legislature, without considering what the court would pronounce reasonable.

2. It has already been decided in Massachusetts [3] that the Legislature may allow a certain class of passengers to ride for less than a reasonable fare. By the Act there upheld, a ferry company was required to carry all passengers who crossed the ferry in a street-car for one cent each. The statutory rate of fare for other passengers was three cents. No difference appears or was suggested in the cost of carrying the two sorts of passengers. If three cents was in the opinion of the Legislature no more than a reasonable fare, it will hardly be denied that one-third of that amount was unreasonably low. Two different amounts may perhaps both be reasonable; but the lower must be remunerative, and the other cannot yield more than a reasonable profit. If the difference in this case was all profit, it could hardly be claimed that two hundred per cent was

[1] Waite, C. J., in Munn *v.* Illinois, 94 U. S. 113, 134.

[2] Munn *v.* Illinois, 94 U. S. 113; Railway *v.* Iowa, 94 U. S. 155; Budd *v.* New York, 143 U. S. 517, and cases cited.

[3] Parker *v.* Railway, 109 Mass. 506.

not unfairly large, and the amounts cannot therefore both be reasonable. But if one cent was reasonable, three cents was, upon the same considerations, more than reasonable; and the Legislature was treating foot-passengers (by exacting an unreasonable fare) in the same way that on the other hypothesis it was treating the ferry company. The decision, therefore, necessarily means that the Legislature has power to reduce the fares of some passengers to less than a reasonable rate; not of any special class of passengers, but of all who may ride in street-cars.

3. It seems clear that the Legislature may exempt some passengers altogether from payment of fare. No decision on this point has been found by the writer; but in establishing a tariff of fares a Legislature must have the power, for instance, to exempt young children.

All carriers are subject to legislative power to the extent indicated; but the carriers now in question stand in a peculiar position. Massachusetts railroads (at least those concerned in this suit, the Old Colony and Boston & Albany) were built under charters closely modelled on the charters of turnpike companies. The earliest chartered of the railroads which now make up the Old Colony and the Boston & Albany[1] were the Boston & Providence Railroad,[2] the Taunton Branch Railroad,[3] and the Boston & Worcester Railroad.[4] The first corporation was empowered only to build the road; the two latter to build and operate it. In all the charters the following clauses occurred, which show the conception then held of the right and obligations of the corporations:

"Be it further enacted that a toll be and hereby is granted and established, for the sole benefit of said corporation, upon all passengers and property of all descriptions which may be conveyed or transported upon said road. . . . The transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads,

[1] Except the Granite Railway (Stat. 1825, ch. 183; 6 Mass. Special Laws, 466). This road was built, before the days of steam railroads, to convey granite from the Quincy quarries to tidewater, and is said to have been the earliest railroad operated in the United States. It now forms part of the Old Colony system. It is noteworthy that none of the clauses quoted were contained in the charter of this road, evidently because it was not to form a public highway, but was a private carrier appurtenant to private quarries. It was to operate its own road, and to "collect a reasonable toll for the conveyance of stone and other property in [its] cars and vehicles."

[2] Stat. of 1831, ch. 56; 7 Mass. Special Laws, 134.

[3] Stat. of 1835, ch. 131; 7 Mass. Special Laws, 557. The last clause above quoted is not contained in this Act.

[4] Stat. of 1831, ch. 72; 7 Mass. Special Laws, 152.

and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations, and provisions as the directors shall from time to time prescribe and direct, and said road may be used by any persons who shall comply with such rules and regulations. . . . The directors are hereby authorized to erect toll-houses, establish gates, appoint toll-gatherers, and demand toll. . . . The state may authorize any company to enter with another railroad at any point of said railroad, paying for the right to use the same, or any part thereof, such a rate of toll as the Legislature may from time to time prescribe."

A railroad established under such a charter must of course expect its fares to have some of the qualities of toll received by a turnpike company. All turnpike charters in Massachusetts at this time exempted certain persons from payment of toll;[1] and any one was by the common law at liberty to use the turnpike without compensation if he did not pass a toll-gate.[2] The fare expected as a condition of carriage by the defendant railroads in this suit must therefore be subject to such conditions.

If, then, by the law as it existed at the time the defendants entered into business the payment of fare was so far subject to legislative control that the fare might in some cases be reduced to an amount not sufficient to produce a fair return upon the property invested, this Act cannot be said to alter the nature of fare. If the Legislature may constitutionally reduce fare to one cent, while a reasonable rate is three cents, there is nothing strange or shocking in its change of fare from three cents to the ticket of another railroad, of the market value of three cents. Or if this seem repugnant to one's idea of legal tender, it is surely no more objectionable than the entire exemption from payment of fare of a class of persons.

For the reasons stated, the Act does not result in a taking of property; and for the same reasons it does not interfere with freedom of contract. In the first place, the carrier does not usually enter into any contract with the passenger; the obligation on each side being created by law, not by agreement.[3] In the second place, upon entering into the business of a carrier one gives up to some extent freedom of contract. It is elementary

[1] Stat. of 1804, ch. 125.

[2] Turnpike Co. *v.* Redd, 2 B. Mon. 30; Buncome Turnpike Co. *v.* Mills, 10 Ired. 30.

[3] Marshall *v.* Railway, 11 C. B. 655; Foulkes *v.* Railway, 4 C. P. D. 267, 5 C. P. Div. 157; Nolton *v.* Western R. R., 15 N. Y. 444.

learning, for instance, that a carrier may not make certain contracts, such as contracts limiting its liability for negligence. An extreme instance of this sacrifice of freedom of contract is presented in the case of Toledo &c. Ry. *v.* Pennsylvania Co.,[1] where it was stated that the employees of a common carrier, though merely servants at will, cannot leave the service so abruptly as to cripple the public business; and this principle would seem to hold true even if the company should become bankrupt.

The legislation under examination is therefore justified as a regulation of the fare of a common carrier.

Even without reference to the nature of the defendants as public carriers, their position as corporations holding franchises from the State prevents them from objecting to any legislation which on the principles already stated does not create a forfeiture of the property invested.

"No one, I suppose, has ever contended that the State had not a right to prescribe the conditions upon which such privilege [*i. e.*, a privilege granted by it] should be enjoyed. The State in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others. The conditions upon which the privilege shall be enjoyed being stated or implied in the legislation authorizing its grant, no right is, of course, impaired by their enforcement. The recipient of the privilege, in effect, stipulates to comply with the conditions. It matters not how limited the privilege conferred, its acceptance implies an assent to the regulation of its use and the compensation for it."[2]

Instances of the power of a State over a corporation chartered by it are worth considering in this connection. A railroad already completed may be required to bear the expense of a new bridge[3] or of a crossing by a new railroad;[4] and a telephone company whose line is established cannot complain that a street railroad is allowed to use electricity as a motive power, and thus destroy the efficiency of the telephone current.[5] So a railroad company may be required to build stations, and to share the use of them with other railroads.[6] And one railroad may be given permission to use

[1] 54 F. R. 746, 752.
[2] Field, J., in Munn *v.* Illinois, 94 U. S. 113, 149.
[3] People *v.* Railroad, 70 N. Y. 569.
[4] Railway *v.* Railway, 30 Ohio St. 604.
[5] Railway *v.* Telegraph Association, 48 Ohio St. 390.
[6] See the opinion of Knowlton, J.

the tracks of another road upon such terms as may be fixed by a commission. It has been held in the latter case that the commissioners may fix the compensation on the basis of the number of passengers carried by the second company over the road of the first,[1] though in that case, of course, payment is deferred until the services have been rendered.

The fact that the Act under discussion was passed after the charter was granted and the road built is admitted to be immaterial; for all charters are subject to amendment since 1831.[2] Such a provision as that contained in the Act in question might have been inserted in the charters of the railroads, and (at least in Massachusetts) there is no doubt that the corporation, if it chooses to retain its franchise, must submit to such a provision if added by amendment. An Act of this kind is always considered to be in the nature of an amendment of the charter. It may be that a charter cannot be so amended as to work a forfeiture; but that, as has been seen, this Act does not do.

It remains to consider the second objection to the Act, — that it requires one carrier to carry according to the conditions of a ticket issued by another carrier. Accepting this interpretation of the Act (which is not quite clear), there is nothing unconstitutional about it. A "condition" can mean nothing but a limitation upon the common-law liability of the carrier. As the railroad is bound, in the absence of agreement, to transport as at common law, and as its liability, were it not for this provision, would be fixed by the law, the effect of the "condition," if any, is to lessen the burden upon the railroad affected by it. Take the instance discussed by the court: a condition limiting the amount of baggage to be carried. At common law the carrier must carry without additional compensation the personal baggage of every passenger. If there is no "condition" of which the carrier may take advantage, he must do so for the passenger who presents a mileage book of another road; if that book gives him permission to carry no more than a specified amount of baggage, however great, it can operate, if at all, only to limit the obligation of the carrier.[3]

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[1] Railway *v.* Railway, 12 All. 262.

[2] Stat. of 1830, ch. 31.

[3] It is true, as suggested by my colleague Judge Smith, that a carrier may by mere regulation, without contract, limit the amount or value of baggage to be carried free with a passenger, and that this right is invaded by the provisions of the Act. I have already expressed a doubt whether the Act is properly interpreted as covering such a

It is not possible to say that the condition of the ticket might extend the liability; the obligation of a contract cannot be extended by a condition contained in it. A condition must be for the benefit of the party bound by the obligation. If a particular mileage book gives its holder a right greater than a ticket would give him, it must be by some positive contract added to the ticket, which would bind no other road than the one issuing it. A ticket gives the right to ride as a passenger, and incidentally to have personal baggage transported; if a ticket should extend permission to the holder to carry samples of merchandise free, the document would be of a double nature, — a ticket, and a contract for the carriage of freight. Another railroad would be bound by the statute to recognize it only in the former aspect. So if a ticket secured the right to a berth in a sleeping-car, it would be both a ticket and a berth check, and would be good on another railroad only as a ticket.

III.

When the question before the court is viewed as one of public expediency, there can be no doubt as to the true result. The public convenience requires some such system as that established by the Act under consideration. There is no appreciable danger of loss to any railroad by reason of the system. Even if one road, in contemplation of bankruptcy, should sell enormous numbers of mileage tickets, the purchasers of them, and not the other railroads, would be the losers; for the railroad commission would doubtless exclude the bankrupt road from the provisions of the Act, leaving the holders of its tickets to their remedy at common law. The practical result of the Act would be, without much doubt, that the more important roads would sell almost all the mileage tickets.

If, however, such an Act as this is not to be supported, we have an alarming state of affairs. It is necessary that bulky articles should be carried to their destination without transshipment; are the railroads to be allowed to levy enormous tolls as conditions of

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case; but even if it is, it is hardly void for that reason. Such regulations are, without question, subject to legislative control. The amount of baggage to be carried could be settled by statute. It is true, perhaps, that the right to regulate the amount cannot be delegated to a stranger; but the Legislature in this Act provides no more than that the railroads shall carry, upon mileage tickets of any road, all personal baggage of passengers, except such as is excluded by the provisions of the ticket. At the worst, there is no question of binding one road by the *contract* of another.

through carriage, on the ground that the Legislature has no right to regulate such a matter? Are they to refuse to carry passengers in cars of modern construction, except upon payment of an exorbitant fare? Are they to decline to check baggage through to its destination; or to draw sleeping-cars belonging to another corporation? The railroad company has acquired a valuable franchise, and has built up along its line great communities whose prosperity is involved in its fair dealing. The Constitution is surely established for the protection of the people, its creators, equally with that of the corporation, its creature. If either public interest or corporate interest must yield, no one can doubt which it should be. If a constitutional amendment is required to bring about the desired result, it may be had.

The court would apparently uphold an Act which would require the railroads to deliver mileage tickets to a State agent who should keep the proceeds of sale of the tickets, and redeem the coupons in the hands of the actual carriers. Would the railroads prefer an Act of that nature?

Statutes in every respect analogous to the one in question have been in force in Massachusetts for many years, and have been before the courts for interpretation several times.[1] These statutes require that the different street railroads in the city of Boston shall accept in payment of fare tickets and transfer checks issued by any other road, and that the ticket or check shall be redeemed by the company issuing it. The constitutionality of these statutes was not, to be sure, considered in the cases referred to; it appears to have been taken for granted. But the legislation was elaborately considered. Great weight should have been given by the court to these statutes, which have been acted upon without question for many years.

J. H. Beale, Jr.

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[1] Pub. Stats. Mass., ch. 113, §§ 46, 47; Wakefield *v.* Railway, 117 Mass. 544; Cronin *v.* Railway, 144 Mass. 249.